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In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE WAYNE GARTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that it violated due process to prosecute him under 18 U.S.C. 658 for conversion of property mortgaged to the Farmers Home Administration (FmHA).

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on five counts charging him with conversion to his own use of livestock and crops that were pledged to the FmHA as collateral for outstanding loans, in violation of 18 U.S.C. 658. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A45).

1. The evidence at trial showed that petitioner, a Texas farmer, applied to the FmHA for an emergency loan in 1979. The loan was composed of four promissory notes totalling $1,650,640. A note for $95,130 covered petitioner's

actual production loss during the 1978 crop year. A second note for $169,520 enabled petitioner to pay creditors for farm equipment, seed, fuel, and fertilizer. A third note for $873,090 restructured petitioner's real estate debt. And a fourth note for $512,900 gave petitioner operating and living expenses for the 1979 crop year. Each of these notes was secured by certain chattel property, including livestock and crops that were growing or would be growing in the future. The security agreement provided that petitioner could not dispose of the pledged collateral without notifying the FmHA or giving it the proceeds. Petitioner was required to report all sales of crops and livestock immediately and to provide the FmHA with a settlement sheet. The agreement remained effective until all the loans were paid. The following year petitioner was issued a new loan in the amount of $623,400 to cover his 1980 operating expenses. This loan was covered by the same security agreement. Pet. App. A9-A12.

In October 1980, petitioner sold his seed milo crop, valued at $100,184, and did not report the sale to the FmHA. On three separate occasions in early 1981, petitioner's son, acting on petitioner's behalf, sold 15, 8, and 98 head of cattle for prices ranging between $2,000 and $24,000. He also sold 136 bushels of wheat for $493.68 and deposited the proceeds in his father's account. None of these sales was reported to the FmHA until 1982 when the Department of Agriculture began its investigation of the matter. Pet. App. A12-A15; Tr. 149-151; GX 9.

At trial, petitioner did not dispute his failure to report the above sales. No witnesses testified on petitioner's behalf, and petitioner introduced no evidence showing how he had used the proceeds of the unreported sales. Pet. App. A15-A16.

2. The court of appeals affirmed petitioner's convictions on all counts (Pet. App. A1-A41). The court rejected (*id.* at A16-A18) petitioner's claim that he could not be prosecuted for conversion because he is a member of the plaintiff class of farmers in *Coleman* v. *Block*, 580 F. Supp. 194 (D. N.D. 1984). A decree entered by the district court in the *Coleman* case barred the FmHA from foreclosing on farmers without adequate notice and hearing. In this case, the court of appeals held that the civil relief granted by the court in *Coleman* was completely irrelevant to the issue of petitioner's criminal liability. The court explained (Pet. App. A18): "In effect, [petitioner] asks us to read *Coleman* as having decriminalized behavior prohibited by 18 U.S.C. 658. *Coleman* did nothing of the sort, nor could it have done so."

3. Petitioner renews (Pet. 8-15) his contention that his convictions cannot stand in light of the decision in *Coleman* v. *Block*. This contention is without merit.

The issue in *Coleman* was whether the FmHA procedure for determining that loans should be liquidated because they were in default comported with due process. The court held that the existing procedure did not comport with due process because it did not give the farmer an opportunity to contest the liquidation decision on administrative appeal before the liquidation procedure was commenced. In particular, the court found that FmHA's practice of declining to release liens in order to recover its security *before* notifying farmers of their right to appeal had the practical effect of denying them the opportunity to appeal because the farmers were pressured economically to liquidate their farms. *Coleman* focused entirely on the civil issues involved in liquidation and foreclosure. It did not discuss criminal sanctions for conversion or in any way alter the borrower's obligation to report immediately to the FmHA the sale of any crops or livestock pledged as security for outstanding loans—a requirement that the *Coleman* court specifically

noted (580 F. Supp. at 199). In short, *Coleman* does not call into question the criminal culpability of farmers who convert pledged property to their own use without notifying the FmHA.

Petitioner's contention appears to be that *Coleman* excuses his conversion here because, as in *Coleman,* the FmHA "froze his income stream" without due process of law, and he was therefore required to use self-help to prevent this violation of his constitutional rights. At the outset, we note that the record does not supply the factual predicate for this contention. Petitioner introduced no evidence at trial showing either that the converted proceeds were spent on necessary living and farming expenses or that the FmHA refused to grant petitioner additional loans. Thus, the record does not show that the criminal conversion was undertaken to preserve petitioner's basic necessities against a freezing of his income stream. And petitioner does not even allege that foreclosure proceedings were commenced against him—the situation involved in *Coleman.*

In any event, the allegation that the FmHA subsequently refused to lend petitioner more money is entirely irrelevant to the conversion prosecution. If the FmHA's decision in this regard was legally flawed, petitioner's remedy is a civil one; he cannot justify the clearly criminal conduct of secretly converting to his own use the property that was pledged as collateral for his loans. By the same token, petitioner's allegation that he used some of the proceeds from those sales to pay his necessary living and farm expenses does not excuse him from reporting the sales to the FmHA. The regulations governing petitioner's loans state that the borrower is "strictly accountable to FmHA for the proper use of proceeds from the sale of security." 7 C.F.R. 1962.17. Whether or not the farmer intends to use the proceeds for living or farming expenses, he is obligated to

report the sales to the FmHA, which can then consider how the proceeds should be applied. Nothing in *Coleman* suggests that this requirement is constitutionally suspect, and it is clear that petitioner violated 18 U.S.C. 658 by ignoring this reporting requirement and converting the proceeds to his own use.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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